Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1517

RAYMOND T. KWIEK,

Petitioner,

vs.

THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF SCHAUMBURG, MARTIN J. CONIGLIO, Chairman of the Board of Fire and Police Commissioners of the Village of Schaumburg, FRED W. VOLKENING, Member, Board of Fire and Police Commissioners of the Village of Schaumburg, DONALD I. PETERSON, Member, Board of Fire and Police Commissioners of the Village of Schaumburg, and MARTIN J. CONROY, Chief of Police of the Village of Schaumburg,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

The Petitioner, Raymond Kwiek, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Illinois Appellate Court, First District.

OPINION BELOW

The opinion of the Illinois Appellate Court, First District, which is unreported, appears as Appendix A hereto.

JURISDICTION

The judgment of the Illinois Appellate Court, First District, was entered on September 23, 1975. A timely filed Petition for Leave to Appeal to the Illinois Supreme Court was denied on January 23, 1976. This petition for Certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether Petitioner was denied his Fourteenth Amendment right to due process where the trial and appellate courts refused to consider his challenge to the constitutional validity of the Village of Schaumburg's Board of Fire and Police Commissioners' Rules 20, 22 and 38.
2. Whether the Village of Schaumburg Board of Fire and Police Commissioners' Rules 20, 22 and 38, which limit a police officer's right to criticize superiors, violate the First and Fourteenth Amendments.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendments One and Fourteen, and Village of Schaumburg Board of Fire and Police Commissioners' Rules 20, 22 and 38 are involved herein and are set forth in Appendix B.

STATEMENT OF THE CASE

Petitioner, Raymond T. Kwiek, had been a police officer with the Village of Schaumburg, Illinois, since 1968. On February 1, 1972, the Chief of the Schaumburg Police Department, Martin J. Conroy, sent Kwiek, by letter, a suspension order stating that the following charges, *inter alia*, were being filed against Petitioner with the Board of Fire and Police Commissioners of the Village of Schaumburg ("Board"):

> 1. Paragraph 20 of the Schaumburg Police Department Rules and Regulations referenced to insubordination whereby false information was given to the Chief of Police in various areas of the Greenfield case in criticism regarding the Greco case which involved the Greenfield letters and the Heidt case;
>
> 2. Paragraph 22 of the Schaumburg Police Department Rules and Regulations whereby superiors were criticized in the handling of various criminal cases and other cases within the Schaumburg Police Department;
>
> 3. Paragraph 38 of the Schaumburg Police Department Rules and Regulations referenced confidential information whereby confidential information was released on a pending court matter.

On March 16, 1972, a hearing on the above related charges was held by the Board. At the hearing the following facts were developed:

Chief Conroy explained the various charges that had been filed against the Petitioner. Chief Conroy further explained to the Board what the "Heidt case", the "Greco affair", and the "Greenfield letter" involved. The "Heidt case" was a criminal case involving an alleged

theft from a Sears Roebuck store by one of Schaumburg's police officers. The "Greco affair" concerned a truck that had been stopped by members of the Schaumburg Police Department for possible overwidth violations. A fracas ensued between the officers and the truckers. After the truckers were arrested, the owner of the Greco Company arrived at the station, and had a conference with Chief Conroy, the police officers and the truckers. Afterwards the Chief ordered that no charges be placed. The "Greenfield letter" involved various inflammatory letters which were sent to the Mayor of Schaumburg and various newspapers criticizing the Chief of Police, Conroy, for his handling of the Greco matter. Conroy further testified as to the basis for the various charges filed against Petitioner and related a number of statements which other officers had told him that Petitioner had made.

Conroy also testified that he had placed an officer, Tom Sultzer, on "special assignment". Conroy described the special assignment as being one in which the officer was allegedly fired from his position and then told to go and mingle with other officers and discuss their feelings regarding Conroy and try to determine who had instigated the "Greenfield letters" matter. Some of the charges which Conroy filed against Kwiek resulted from various statements made to this "officer on special assignment" by Petitioner.

Further evidence resulted from conversations overheard by two police officers, William Bartkvich and Detective Barabas, while hiding in an attic of the house of the police officer on special assignment. They overheard Petitioner's discussions regarding Chief Conroy with the special agent and the special agent's father. Furthermore, the evidence revealed that all of the comments made by Petitioner were done in private, were

not publicly disseminated and, for the most part, were made while Petitioner was off duty.

Petitioner testified on his own behalf that he had been a Village of Schaumburg policeman for four years. He had been suspended for one day on each of two prior occasions for failing to appear in court. These were the only negative aspects of an otherwise good record. Petitioner admitted criticizing Chief Conroy and other police department officials in private conversations with Tom Sultzer and noted that Sultzer and other police officers had criticized the Chief of Police.

After the hearing, the Board issued written findings on April 17, 1972. The Board determined that Petitioner should be discharged and removed from his position as a patrolman with the Schaumburg Police Department. In support thereof it made various findings of fact and law. With regard to the specific facts of the case, the Board made the following findings:

> 7. Respondent, as charged herein, and contrary to the Rules and Regulations of the Police Department of the Village of Schaumburg, was guilty of insubordination, contrary to Paragraph 20 of Section 1 of said Rules and Regulations, in that: A) he did on numerous occasions, including October 10, 1971, October 28, 1971, and December 18, 1971, make critical and derogatory statements about the Chief of Police of the Village of Schaumburg which statements were made to other members of the Police Department of the Village of Schaumburg, and thereby impugned the character of said Police Chief; B) he refused to give information requested of him by superior officers relative to a pending criminal matter involving one William Heidt, when such information was within the knowledge of Respondent; C) he refused to recognize his obligation to give such information, claiming that he was excused because such information was obtained

while he was off duty and not assigned to the case; and D) he demonstrated divided loyalty as between his duties as a police officer and to said William Heidt.

8. Respondent, as charged herein, and contrary to the Rules and Regulations of the Police Department of the Village of Schaumburg, Illinois, including Paragraph 22, Section 1, of said Rules and Regulations, was guilty of: A) criticizing members of the Police Department of the Village of Schaumburg, Illinois, namely, Police Chief Martin J. Conroy, Sgt. James J. Dillon, and Sgt. Daniel M. Coursey, as to their background, character and conduct in general to such an extent as to bring the character of such members of the department into disrepute and to thereby bring the Police Department into disrespect and disrepute; and B) as to Police Chief Martin J. Conroy and Sgt. Daniel M. Coursey specifically with respect to their official actions in connection with the incident known as the "Greco matter", to such an extent as to bring the character of such members of the department into disrepute and to thereby bring the Police Department into disrespect and disrepute; and C) he did on numerous occasions, including on October 10, 1971, October 28, 1971, and December 18, 1971, make critical and derogatory statements about Police Chief Martin J. Conroy, which statements were made to other members of the Police Department of the Village of Schaumburg, and thereby impugned the character of said Police Chief and brought the Department into disrespect and disrepute.

9. Respondent, as charged herein, and contrary to the Rules and Regulations of the Police Department of the Village of Schaumburg, Illinois, including Paragraph 38, Section 1, of said Rules and Regulations, was guilty of releasing information covering the affairs, business or operation of the said Police Department without the consent of the Commanding Officer, in that during the pendency

of the criminal case against said William Heidt, Respondent did voluntarily telephone the attorney for said William Heidt and informed him that he had given a statement to the Police Chief relating to his knowledge of the Heidt matter, all without the consent, knowledge or authorization by the Commanding Officer of the Chief of Police.

A request for rehearing was made and subsequently denied by the Board on May 20, 1972. On June 13, 1972, Petitioner filed a complaint for administrative review in the Circuit Court of Cook County, Illinois. Said complaint for review challenged the constitutionality of various sections of the Schaumburg Police Department Rules and Regulations and also challenged the findings of the Board. On November 13, 1972, after reviewing the record before the administrative board, briefs of counsel and argument, but without taking testimony, Judge Robert Downing entered an order affirming the findings and decision of the Board. In his order, Judge Downing stated that, "without passing on the constitutionality of paragraph 22 of the Rules and Regulations", (he) found and decreed that there was sufficient evidence to support the findings of the Board and that the findings and conclusions of the Board were not against the manifest weight of the evidence. This order was the sole finding of the Court. Petitioner filed a timely Notice of Appeal, and prosecuted it in the Appellate Court. On September 23, 1975, the Appellate Court affirmed Judge Downing (a copy of the order of the Appellate Court appears as Appendix A to this Petition).

The Appellate Court, in its opinion, did not discuss the constitutionality of Rule 22 of the Board's Rules and Regulations. In his Petition for Leave to Appeal to the Illinois Supreme Court, Petitioner challenged the constitutionality of paragraphs 20, 22 and 38 of the Board's Rules. That Petition was denied on January 23, 1976, without opinion, and this petition follows.

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL AND APPELLATE COURTS DENIED PETITIONER HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY FAILING TO CONSIDER THE CONSTITUTIONAL CHALLENGE MADE BY PLAINTIFF TO THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF SCHAUMBURG'S RULES 20, 22, AND 38.

Ever since charges have been filed against Petitioner, he has consistently attempted to raise the issue of the constitutionality of various sections of the Rules and Regulations of the Board, paragraphs 20, 22 and 39. These Rules are set forth as Appendix B.

However, no court has attempted to resolve the issue raised by Petitioner. The Board refused to hear the issue and dispensed with it. The trial judge specifically stated in his order that he was not considering the constitutionality of the rule. The Appellate Court, other than quoting the trial judge's finding, made no ruling on the issues raised. This failure to deal with the serious issue, to wit: the constitutionality, both on their face and as applied, of these rules, denies Petitioner fundamental due process in that he has a right to be heard. See, e.g. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Railroad Commission of California v. Pacific Gas and Electric Co.*, 302 U.S. 388 (1938); see also, *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973); *Matzner v. Davenport*, 288 F.Supp. 636, aff'd. 410 F.2d 1376 (2d Cir. 1968); *Baker v. City of Fairbanks*, 471 P. 2d 386 (Alaska, 1970). No court has, as yet, heard this issue, and their failure to consider or decide this most important issue, which has ramifications for many police departments throughout the nation, is a violation of the trust placed

in them. This Court as the Supreme Court of the United States, has the obligation to rule on questions of constitutional magnitude. The failure of the lower state courts to resolve this question leaves Petitioner with his sole recourse now in this Court. State courts should not readily abrogate to the federal courts their duty and responsibility to decide constitutional questions. The complete abrogation which has occurred here should not be allowed to go on and should not be condoned.

By failing to consider this issue, the state courts have merely encouraged further litigation rather than acting to definitively determine the issues raised. This inactivity creates a strain on the judicial system and denies Petitioner his right to be heard.

II.

PARAGRAPHS 20, 22 AND 38 OF THE RULES AND REGULATIONS OF THE VILLAGE OF SCHAUMBURG POLICE DEPARTMENT, WHICH LIMIT A POLICE OFFICER'S RIGHT TO CRITICIZE SUPERIORS, ARE UNCONSTITUTIONAL EITHER ON THEIR FACE OR AS APPLIED TO PETITIONER.

As stated in *DeGrazio v. Civil Service Commission*, 31 Ill. 2d 482, at 485:

> The rules of a police department are administrative regulations and have the force and effect of law (*Harrison v. Civil Service Co.*, 1 Ill. 2d 137). Therefore, they must be construed by the same standards governing the construction of statutes (2 Am. Jur. 2d, Administrative Law, Sec. 298 p. 125). A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. (*Baggett v. Bullitt*, 377 U.S. 360, 12 L.Ed. 2d 377, 84 S.Ct. 1316; *Hershey Mfg. Co. v. Adamowski*, 22 Ill. 2d 36).

It is apparent from a reading of Paragraphs 20, 22 and 38 of the Rules and Regulations of the Schaumburg Police Department that each is, on its face, vague and overbroad, in violation of the First and Fourteenth Amendments of the Constitution of the United States.

Although this challenge was not determined by the Board or the Courts, if the sections are unconstitutional, then Petitioner was significantly prejudiced in that most of the Board's hearing concerning the critical comments about Chief Conroy and served to bias the Board.

In *Muller v. Conlisk*, 429 F. 2d 901 (7th Cir. 1970), the Court ruled on the validity of the Chicago Police Department Rule 31, which, similar to Paragraphs 20, 22 and 38, prohibited "any activity, conversation, deliberation, or discussion which is derogatory to the Chicago Department . . ." 429 F. 2d at 903. The Court found:

> . . . it is clear beyond dispute that the rule is overbroad. In substance, it prohibits all criticism by policemen of the department. It may no longer be seriously asserted that policemen, have no right to criticize their employer.
>
> * * * *
>
> . . . it is clear that the First Amendment would reach and protect some speech by policemen which would be considered 'derogatory to the department'. Rule 31 on its face prohibits all such speech, *even private conversation*, and is for that reason unavoidably overbroad . . . (429 F.2d at 903-904). (emphasis supplied).

See also *Flynn v. Giarrusso*, 321 F. Supp. 1925 (E.D. La. 1971).

The regulations under scrutiny in the case at bar, like the regulations held invalid in *Muller* and *Giarrusso*, are too broad. They encompass without exception all

criticism and derogatory statements regardless of the context in which such statements are made (Paragraphs 20 and 22); and the dissemination of any "information" concerning the "affairs, business or operation of the Police Department" regardless of how innocuous the information might be, and without reference to any standard to determine if such information ought justifiably be classified as confidential (Paragraph 38). All three regulations are so broad and sweeping that they suffocate the First Amendment rights of the Petitioner, which rights he did not waive by chosing to become a policeman.*

Moreover, the operative language found in Paragraphs 20, 22 and 38 is impermissibly vague. Terms such as "critically or derogatorily" (Paragraph 20), "discuss or criticize" (Paragraph 22), and "information" (Paragraph 38) are the kind of terms which have traditionally been viewed by the Courts with disapproval unless their use is accompanied by clear definitions regarding what is meant thereby. See *Muller supra*, *Giarrusso, supra*. Such language leaves it to the policeman to guess what conduct will violate the prohibition encompassed by the regulations, and what conduct will not. When one must guess what conduct or utterance might lose him his position the prohibition cannot stand. *Keyishian v. Board of Regents*, 385 U.S. 589.

But even assuming, *arguendo*, that Paragraphs 20, 22 and 38 are not unconstitutional on their face, the record discloses that each was applied in the instant case in a fashion which unreasonably and unconstitutionally abridged Petitioner's First Amendment rights.

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* In *Kelley v. Johnson*, 44 U.S.L.W. 4469 (April 6, 1976), this Court recently discussed the rights of police officers to wear their hair in a certain manner. This Court did not, however, reach the question of the extent to which police departments can limit the free speech of their employees.

The Board found that Petitioner violated Paragraphs 20 and 22, by speaking critically and derogatorily of Chief Conroy and other members of the police department. The Board's finding was based on testimony concerning a series of conversations between Petitioner and other police officers. Those conversations were admittedly private in nature and took place while Petitioner was off duty. Also, the statements were made to a spy that Conroy had ordered to discover various types of information, were overheard by officers who were in hiding and had many indicia of acts of entrapment. Further, by Chief Conroy's own admission, what was said by Petitioner *did not impair the efficiency or discipline of the Police Department.* Petitioner respectfully submits that if Paragraphs 20 and 22 are to be construed in a fashion which does not violate First Amendment freedoms, then at the very least the prohibitions contained in those paragraphs must be interpreted as (1) applying only to public statements of police officers which are (2) likely to affect the discipline and efficiency of the Department. And under such an interpretation, the evidence heard by the Board would certainly not support a guilty finding.

The Board found that Petitioner violated Paragraph 38 in that he "voluntarily telephoned the attorney for . . . William Heidt and informed him that he had given a statement to the Police Chief relating to his knowledge of the Heidt matter . . . without the consent, knowledge or authorization [of] . . . the Commanding Officer or the Chief of Police." (A. 12 B p). To hold that Paragraph 38 encompasses this alleged activity is to give Paragraph 38 a construction which clearly goes well beyond legitimate boundaries. The Heidt case was pending in the Circuit Court of Cook County at the time the alleged statement by Petitioner was given and was, therefore, of

public record. The existence of a statement relative to a pending criminal case cannot rationally be interpreted as constituting a matter which is germane to the "affairs, business or operation of the Police Department". Rather, it is a matter which is relevant to the pending litigation and is discoverable by the defense under the Rules of The Supreme Court of Illinois. The Schaumburg Police Department would, accordingly, have no right to treat the statement as confidential or to withhold the fact of its existence. Moreover, the discovery of the statement might well have been mandated by *Brady v. Maryland*, 373 U.S. 83 (1963), and to attempt to hide the existence of such a statement would be a much more serious violation of a police officer's duty. Also, the contents of the statement were not disclosed. Hence, assuming Petitioner did tell the attorney for Officer Heidt that Petitioner had given a statement that act on the part of Petitioner cannot reasonably be held to fall within the prohibition of Paragraph 38.

Petitioner requests that this Court grant his Petition so as to clarify the standards which govern police officers in terms of their rights to criticize their superiors, to attempt to uncover wrongdoing on the part of those superiors and to fulfill various obligations under the Constitution of the United States. Moreover, this Court must resolve the differences created by the instant case and various lower federal court cases. Compare *Muller, supra.*

The events in this case took place prior to "Watergate" and before the "Post-Watergate" morality became bandied about. However, there is no difference in morality just because a certain point in time has been reached. Nothing that the Petitioner in this case did was wrong or required his dismissal. The utilization of rules such as those at issue here by the police department and the

Board constitute a serious infringement upon this police officer's rights, and every police officer who is subject to these or similar rules.

CONCLUSION

For these reasons, Petitioner Raymond T. Kwiek respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court, First District.

Respectfully submitted,

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APPENDIX A

ILLINOIS APPELLATE COURT
FIRST DISTRICT

No. 58640

RAYMOND T. KWIEK,

Plaintiff-Appellant,

v.

THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF SCHAUMBURG, MARTIN J. CONIGLIO, Chairman of the Board of Fire and Police Commissioners of the Village of Schaumburg, FRED W. VOLKENING, Member, Board of Fire and Police Commissioners of the Village of Schaumburg, DONALD I. PETERSON, Member, Board of Fire and Police Commissioners of the Village of Schaumburg and MARTIN J. CONROY, Chief of Police of the Village of Schaumburg.

Defendants-Appellees.

ORDER

This was a suit by which plaintiff-appellant Raymond T. Kwiek sought administrative review of the findings and decision of the Board of Fire and Police Commissioners of the Village of Schaumburg. Kwiek asked the trial court to reverse the Board's discharge of him as a policeman on the Schaumburg police force.

Pursuant to Ill. Rev. Stat. 1971, ch. 110, § 272 (a), plaintiff-appellant was required, on motion of defendants-appellees, to file a specification of the errors on which he relied for reversal. He did so and stated that his claimed errors were that the findings of the Board were not supported by the evidence or were not substantiated by the record. In the only specification that differed from the others, plaintiff-appellant

referred to the fact that his counsel had raised the constitutionality of a paragraph of the rules and regulations of the Schaumburg Police Department which he had been accused of violating.

The trial court, proceeding under the administrative review act, Ill. Rev. Stat. 1971, ch. 110, §§ 264, et seq., considered the pleadings, the record made before the Board, the memoranda of the parties, the arguments of counsel, and stating that it was not "* * * passing on the constitutionality of paragraph 22 of the rules and regulations * * *," found that there was sufficient evidence in the record to support the Board's findings and decision. The court ruled that the findings and decision were not against the manifest weight of the evidence and should be affirmed. It appears, therefore, that in this appeal the only issue before this court is whether the findings and decision of the Board of Fire and Police Commissioners of the Village of Schaumburg were against the manifest weight of the evidence.

This issue, in cases just like this one, has been resolved many times by reviewing courts of this state. In reviewing the findings and decision of an administrative agency like the Board in this case, the function of the trial court was limited to ascertaining if the findings and decision were against the manifest weight of the evidence (*Rizzo v. Board of Fire and Police Commissioners*, 131 Ill. App. 2d 229, 233, 267 N.E. 2d 7; *DeGrazio v. Civil Service Commission of Chicago*, 31 Ill. 2d 482, 202 N.E. 2d 522.) In such a case, it is for the administrative agency, not the courts, to determine the credibility of witnesses, resolve conflicts in the testimony, and determine the questions of fact. See *Davenport v. Board of Fire and Police Commissioners*, 2 Ill. App. 3d 864, 278 N.E. 2d 212. Our function in such a case like this one, is to determine whether the trial court ruled correctly when it concluded that the administrative record showed there was evidence that sufficiently supported the findings of the Board; and that the findings and decision were not against the manifest weight of the evidence. *Zinser v. Board of Fire and*

Police Commissioners, 28 Ill. App. 2d 435, 437, 172 N.E. 2d 33.

We have examined the record and conclude that the testimonial and physical evidence heard by the Board support its findings and decision. In our view, and that of the trial court, the findings and decision of the Board were not against the manifest weight of the evidence. An opinion in this case will have no precedential value. The question presented by plaintiff-appellant is not substantial. In the context of the facts before us, the question is not a fairly debatable one; it has been answered before. See *Crowell v. Daley, etc., et al.*, ... Ill. App. 3d .... N.E. 2d ..... (No. 60677); *Kelly v. Police Board of the City of Chicago*, 25 Ill. App. 3d 559, 323 N.E. 2d 624; *Coursey v. Board of Fire and Police Commissioners*, 90 Ill. App. 2d 31, 234 N.E. 2d 339; compare *Petraitis v. Board of Fire and Police Commissioners of the City of Palos Hills*, ... Ill. App. 3d ....., ... N.E. 2d ..... (No. 61089). These answers were expressed in extensive written opinions. A substantial question is one that is fairly debatable. Compare *Ortiz v. Greyhound Corporation* (D.C. Md. 1959), 192 F. Supp. 903, 905; *United States v. Stephenson* (D.C. Alaska 1953), 110 F. Supp. 623, 627. In our judgment, a question is not fairly debatable if it has been answered in written opinions of other reviewing courts of this state. Therefore, we dispose of this appeal on the authority of Supreme Court Rule 23, Ill. Rev. Stat. 1975, ch. 110A, par. 23 (amended effective July 1, 1975). The judgment is affirmed.

/s/ John J. Stamos, Justice

/s/ George N. Leighton, Justice

/s/ John C. Hayes, Justice

Dated: September 23, 1975

APPENDIX B

U.S. Const. Amend. 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. XIV:

SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Village of Schaumburg Board of Fire and Police Commissioners' Rules:

Paragraph 20 provides:

INSUBORDINATION. Members and employees of the Police Department shall treat their superior officers with respect, and in their demeanor toward other associates in the department shall be courteous and considerate, guarding themselves against jealousy and other unfriendly feeling. It is their duty to inform their superior officers of any neglect or disobedience of orders that may come to their knowledge. Members and employees shall not, under any circumstances, or in any manner whatsoever, speak critically or derogatorily to any member of the department, or to any person outside the department regarding the orders or instructions issued by a superior officer; provided, however, in any case where there is a sound reason to believe that such orders or instructions are inconsistent or unjust it is the

right and duty of any member or employee to appeal to higher authority.

Paragraph 22 provides:

CRITICIZING. Members of the Department shall not discuss or criticize publicly or privately the personal habits, character or conduct, or the official action of other members of the Department unless it be a violation of the rules and regulations, in which case the same should be reported to their superior officers.

Paragraph 38 provides:

CONFIDENTIAL INFORMATION. No member of the Department shall give out or release any information covering the affairs, business or operation of the Police Department without the consent of the Commanding Officer. Members and employees of the Police Department shall not deliver addresses in meetings concerning the work of the Police Department, nor shall they make statements for publication concerning plans, policies or affairs of the Police Department unless authorized to do so by the Chief of Police.

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Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1517.

RAYMOND T. KWIEK,

Petitioner,

vs.

THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF SCHAUMBURG, MARTIN J. CONIGLIO, CHAIRMAN OF THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF SCHAUMBURG, FRED W. VOLKENING, MEMBER, BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF SCHAUMBURG, DONALD I. PETERSON, MEMBER, BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF SCHAUMBURG, AND MARTIN J. CONROY, CHIEF OF POLICE OF THE VILLAGE OF SCHAUMBURG,

Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT.

STATEMENT OF THE CASE.

The petitioner's statement of the case is not only highly selective—it is patently misleading. It presents to the Court a totally false picture of the issues raised in the trial court and the Appellate Court. It seeks to present to this Court constitutional questions which were never raised in the trial court and which

need not have been considered by either the trial or the Appellate Court in reaching their decisions.

The petitioner would have this Court believe that his dismissal was based solely upon of his exercise of freedom of speech. By omitting most of the relevant material in the proceeding before the administrative agency and the trial court, the petitioner fails to fully inform this Court of the issues that were properly determined by the state courts and clearly do not involve any questions which either vest jurisdiction in this Court or call upon this Court's authority to exercise its discretion to consider this matter.

The petitioner fails to inform the Court that, in addition to violations of Paragraphs 20, 22 and 38 of the Rules of the Schaumburg Police Department, the petitioner was also charged with and found guilty of violating Paragraph 18 for giving false reports, Paragraph 39 for failing to report a subpoena to his superior officer, and for incompetency and inefficiency, for disregarding Rules and Regulations and a General Order by removing case reports without proper authorization. These specific charges, in no way referred to in the petition, included the following:

> "1. Paragraph 18 of the Schaumburg Police Department Rules and Regulations reference to false reports and whereby you made a misstatement involving a criminal case which was being conducted by the Schaumburg Police Department by Sgt. Hammond of the Schaumburg Police Department." (Abst. A1)
>
> "5. Paragraph 39 of the Schaumburg Police Department Rules and Regulations reference to subpoenas whereby you failed to immediately notify your immediate commanding officer that you had received a subpoena to testify for the defense in a criminal matter pending with the Schaumburg Police Department." (Abst. A2)
>
> "6. Incompetency and inefficiency whereby you disregarded Rules & Regulations and failed to adopt a proper police attitude, as well as your obligation as a police officer

> to supply any and all information within your knowledge relative to department affairs and involving a criminal action that involved the Schaumburg Police Department and one of its members; also whereby you violated General Order No. 71-5 issued July 26, 1971 reference to removing of reports, to-wit, D.W.I. case reports without proper authorization." (Abst. A7)

The petitioner does not inform the Court that he was found guilty of these three charges.

The Findings and Decision of the Board of Fire and Police Commissioners, entered on April 17, 1972, which was the subject matter of the administrative review proceeding in the trial court, contained the following Findings:

> "6. Respondent, as charged herein, and contrary to the aforesaid Rules and Regulations for the Police Department of the Village of Schaumburg was guilty of making misstatements and false reports verbally on or about July 21, 1971, September 15, 1971, and September 27, 1971, in violation of Paragraph 18 of Section 1 of said Rules and Regulations, in that he knowingly stated to superior officers on those dates that he had no recollection of events taking place on June 29, 1971 relative to the arrest of William Heidt, whereas in a subsequent written statement made by Respondent on September 27, 1971 he related the details of such events." (Abst. A10)
>
> "10. Respondent, as charged herein, and contrary to the Rules and Regulations of the Police Department of the Village of Schaumburg, Illinois, including Paragraph 39, Section 1, of said Rules and Regulations, was guilty of failing to report to his Commanding Officer that he had been subpoenaed to appear for the defense in the prosecution of the criminal case against William Heidt." (Abst. A13)
>
> "11. Respondent, contrary to his oath of office as a police officer, and contrary to a direct written order of the Chief of Police, namely, General Order No. 71-5, issued July 26, 1971, did: A) remove certain police reports relative to the aforesaid 'Greco matter' from the official and

confidential files of the said Police Department; and B) remove from said official files of the Police Department reports relating to the charges of driving a motor vehicle while under the influence of intoxicating liquors, all without the consent, knowledge or authorization of the Chief of Police or any other superior officer." (Abst. A13)

In describing the evidence before the administrative agency, the petitioner totally ignores the evidence upon which the Board of Fire and Police Commissioners found the petitioner guilty. This evidence was before the trial court and the Appellate Court, both of which affirmed the decision of the administrative agency. The evidence indicates that the petitioner was present at the home of one, William Heidt, a former police officer, at the time Heidt was arrested for theft and the stolen goods were discovered on the premises. This incident occurred on June 29, 1971. The evidence indicated that on July 21, September 15 and September 27, Kwiek had stated to superior officers that he had no recollection of the events taking place on that date. Subsequently, he gave a written statement relating the details of the events which had taken place. He explained his loss of memory on the grounds that Heidt was a friend and that he, Kwiek, did not want to be involved; besides, he was off duty at the time.

The petitioner also fails to report to the Court the evidence adduced before the administrative agency that he received a subpoena to appear for the defense when Heidt was being tried on August 10, 1972. This subpoena was not reported to his commanding officer, despite the departmental rule, and the Police Department heard about the subpoena only from another witness who had observed Kwiek in court on that day. (Abst. 37, Addl. Abst. 5) Kwiek's commanding officer specifically testified that Kwiek never told him he had received a subpoena in the case. (Abst. 42, 43)

The evidence also omitted from the petitioner's statement of facts included testimony that Kwiek had told a polygraph

examiner that he had removed D.W.I. reports from the Schaumburg Police Department and taken them home without proper authorization.

Also omitted is the testimony of Kenneth Dopp of a conversation with Kwiek where Kwiek indicated he had removed the Greco incident file from the police station, had photocopied the report, and then had taken it to his home. (Addl. Abst. 4)

The petitioner does not even fully report his own testimony before the administrative agency. He admitted removing records from the Schaumburg Police Department. (Addl. Abst. 7) He had never reported his suspicions about Heidt and the Greenfield letters to his superior officers. (Addl. Abst. 8) He admitted that he had voluntarily called Heidt's attorneys to tell them when he finally gave a statement with respect to the events occurring at Heidt's home, although he had not been requested to notify them if a statement was given. (Addl. Abst. 8)

Despite the fact that he was a police officer and was present at the scene when stolen goods were recovered and Heidt was arrested, Kwiek did not feel he had any responsibility to the state or to the prosecutor. He felt he had no responsibility to give any statements. (Addl. Abst. 8)

Thus, there were three additional charges, having nothing to do with any First or Fourteenth Amendment rights, which were the subject matter of the trial before the administrative agency. In reading the petition, one would never know that the petitioner had been tried and found guilty of giving false reports to his superiors, failing to report a subpoena, and removing Police Department files without authorization. Thus, the petition filed herein by its blatant omissions gives a completely false statement of the facts of this case.

There is another critical aspect in which the petitioner's statement of the case is apparently designed to mislead this Court. The entire petition is based upon a constitutional challenge to the validity of the Village's Rules. Yet, no such con-

stitutional question was ever raised before the trial court, and the constitutional questions were thereby clearly waived.

The proceeding was initiated by a complaint for administrative review pursuant to the provisions of the Administrative Review Act which provides for judicial review of administrative decisions by agencies such as the Board of Fire and Police Commissioners. (Ill. Rev. Stat. 1975, Ch. 110, § 264) The complaint for administrative review failed to raise any constitutional question. It states that the findings of the administrative agency "are contrary to the manifest weight of the evidence." (Abst. 20) Nowhere in the five page complaint is there any allegation that any Rules of the Board of Fire and Police Commissioners were invalid or unconstitutional.

Under the provisions of Section 9 of the Administrative Review Act (Ill. Rev. Stat. 1975, Ch. 110, § 272), upon the motion of the defendant or upon the court's own motion, the court may require of the plaintiff a specification of errors relied upon for reversal. Pursuant to such motion, a Memorandum of Errors was filed by the plaintiff in this case. (Abst. A22-A29) Here again, there was absolutely no allegation that Paragraphs 20, 22 or 38 were unconstitutional. The only reference to any of these Rules was found in paragraph 3 of the Memorandum of Errors, in which the following appears:

> "At Page 239 of the transcript of the proceedings, Mr. Arthur Loevy, the attorney for the Respondent, raised the issue of the constitutionality of Paragraph 22, Section 1 of the Rules and Regulations of the Department of Police of the Village of Schaumburg. In support of his contention that the aforementioned rule was violative of the First Amendment right to freedom of speech, Mr. Loevy cited *Miller* v. *Conlisk*, 429 Fed. 901, 1970, and *Flynn* v. *Giarusso*, 321 Fed. Suppl. 1295, 1971. While the record does reflect some attempt by the attorney for the Board of Fire and Police Commissioners of the Village of Schaumburg to respond to the aforementioned, there is nothing in the record to indicate any such response was ever made." (Abst. A25)

There is no allegation in the Memorandum of Errors that Paragraph 22 or any other paragraph of the Rules was unconstitutional. The trial court thus properly did not pass upon the constitutional challenges now belatedly made before this Court. The final judgment order of the trial court specifically recites that the court was making its determination "without passing on the constitutionality of Paragraph 22 of the Rules and Regulations." The trial court went on to find "that there was sufficient evidence in the record to support the findings and determination of the Board of Fire and Police Commissioners of the Village of Schaumburg" and "that the findings and conclusions of said Board are not against the manifest weight of the evidence." The court then affirmed the Findings and Decision of the Board, dated April 17, 1972. (Abst. 30)

As indicated in the petition, the Appellate Court, finding that the case raised no questions which were fairly debatable, affirmed the trial court by order rather than opinion pursuant to Rule 23 of the Illinois Supreme Court. (Ill. Rev. Stat. 1975, Ch. 110, § 23)

Thus, contrary to the impression sought to be engendered by the petitioner's statement of the case, this cause involved three additional charges of which the petitioner was found guilty, which are not even mentioned in the petition. It also involved a complaint and specification of errors in which the constitutional questions were not raised and thereby waived. The questions now sought to be raised in this Court were actually sought to be raised for the first time in the Appellate Court and in the petition for leave to appeal to the Illinois Supreme Court, which petition was properly denied by that Court on January 23, 1976.

REASONS FOR NOT GRANTING THE WRIT.

I.

The Petitioner Was Not Denied His Fourteenth Amendment Right to Due Process Because the Courts Failed to Consider the Constitutionality of Rules 20, 22 and 38.

The petitioner was clearly not denied his Fourteenth Amendment rights because neither the trial court, the Appellate Court nor the Supreme Court of Illinois considered the constitutional challenge to Rules 20, 22 and 38. Such a challenge was never made in the trial court either by the complaint or Memorandum of Errors. Moreover, even had the challenge been made, there was ample evidence in the record to support the decision of the administrative agency without considering the constitutional question.

The Illinois courts have accepted the general rule that constitutional questions will not be considered if the case may be disposed of on other grounds. *People* v. *Vandiver*, 51 Ill. 2d 525, 527 (1971); *People* v. *Dixon*, 28 Ill. 2d 122, 125 (1963); *Osborn* v. *Village of River Forest*, 21 Ill. 2d 246, 249 (1961).

This Court has of course followed the same principle and has not decided constitutional questions when the case may be decided on non-constitutional grounds. *Hagans* v. *Lavine*, 415 U. S. 528, 547 (1974), 39 L. Ed. 2d 577, 594; *United States* v. *Campos-Serrano*, 404 U. S. 293, 295 (1971), 30 L. Ed. 2d 457, 460; *Alexander* v. *Louisiana*, 405 U. S. 625, 633 (1972), 31 L. Ed. 2d 536, 544; *Burton* v. *United States*, 196 U. S. 283, 295 (1905), 49 L. Ed. 482, 485.

It is clear in this case that the petitioner was not denied due process or that he was denied the right to be heard. There was an extensive hearing before the administrative agency. There was judicial review as provided by Statute in the trial court. The matter was heard in the Appellate Court for the

First District and considered on petition for leave to appeal by the Illinois Supreme Court. All three courts had before them the entire record in the proceeding below. The failure to pass upon the constitutional questions arose simply out of the fact that the questions not only were not presented, but it was not necessary to pass upon the constitutional questions in order to decide the case.

When there are multiple charges against a public employee as in the instant case, a single valid finding is sufficient to constitute the basis for entering an order of discharge and the other contentions need not be considered. *Moriarty* v. *Police Board of Chicago*, 7 Ill. App. 3d 978, 982 (1972); *DeGrazio* v. *Civil Service Commission*, 31 Ill. 2d 482, 489 (1964). Here, of course, there was ample evidence to support all the charges, including three charges unrelated to Rules 20, 22 and 38.

Under Illinois law a reviewing court will not disturb the factual findings of an administrative agency unless the findings are clearly against the manifest weight of the evidence. The court will not reweigh the evidence even though an opposite conclusion might be reasonable. *Moriarty* v. *Police Board of Chicago*, 7 Ill. App. 3d 978, 982 (1972); *DeGrazio* v. *Civil Service Commission*, 31 Ill. 2d 482, 489 (1964); *Davern* v. *Civil Service Commission*, 47 Ill. 2d 469 (1971). Thus, there was no necessity to have considered the constitutional questions involved in Rules 20, 22 and 38, even had they been presented.

This Court's decision in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970) dealt with the necessity of a hearing for the termination of public assistance benefits. It of course has nothing to do with the instant case where ample hearing was afforded the petitioner and ample evidence adduced to support his discharge on at least six grounds. The case of *Railroad Commission of California* v. *Pacific Gas and Electric Company*, 302 U. S. 388 (1938), also cited by the petitioner, had to do with due process in a state's utility ratemaking procedures. Again, an examination of the case

shows it has absolutely no bearing on the issues presented in this petition.

Chaffin v. *Stynchcombe*, 412 U. S. 17 (1973), had to do with due process in sentencing upon reconviction. The Court held that there was no violation of due process because the prisoner had received a more severe sentence on reconviction.

Finally, it should be noted that this Court in the very recent case of *Bishop* v. *Wood*, No. 74-1303, decided June 10, 1976, ... U. S. ....., 44 LW 4820, specifically held that a police officer did not have a property right in his position and that the petitioner's discharge, even if wrongful, did not deprive him of a property interest protected by the due process clause of the Fourteenth Amendment.

We therefore respectfully suggest that there was no denial to the petitioner of any Fourteenth Amendment right because the trial, Appellate and Supreme Courts of Illinois refused to consider a constitutional question which was not properly before them in a case where there were multiple bases for discharge shown and where there was no property right in the petitioner's position as a police officer which was protected by the Fourteenth Amendment.

II.

Paragraphs 20, 22 and 38 of the Rules and Regulations of the Schaumburg Police Department Are Not Unconstitutional.

As we have indicated above, the constitutionality of these Rules was not properly before any of the state courts. The petitioner simply failed to raise the constitutional issues. As a matter of fact in his Memorandum of Errors, only Rule 22 was mentioned and then in an oblique manner not constituting a specific challenge to its constitutionality.

Moreover, it is quite clear that the regulations in question need not be considered by this Court because there was ample bases for the petitioner's discharge on grounds other than the

Rules which are now challenged. This Court, like the Illinois Supreme Court, should therefore not pass upon a constitutional challenge when there are other grounds for fully and fairly disposing of the action.

The petitioner relies primarily upon the Seventh Circuit decision of *Muller* v. *Conlisk*, 429 F. 2d 901 (7th Cir. 1970). It should be noted in the first instance that the rule challenged in the *Muller* case was much broader than the Rules purportedly challenged here for the first time. The Chicago Police Department rule in question covered "any activity, any conversation, any deliberation, or any discussion," which was derogatory to the Department or any other member or policy of the Department. Not only did the Chicago rule go well beyond the language of the Schaumburg rule but, unlike the rule in *Muller*, the Schaumburg Rule provided a remedy under Rule 22 for actions which were properly subject to criticism. If such actions are a violation of the Rules and Regulations, they were to be reported to the superior officer of the policeman making such an observation. Rule 20, which was never challenged, restricts speech only to that which is critical or derogatory regarding the orders or instructions issued by a superior officer, and again provides that when such orders or instructions are inconsistent or unjust, the right of appeal to higher authority is to be followed. Rule 38, which was also never challenged, prohibits the giving out of information without the consent of the commanding officer, certainly a reasonable and legitimate method of maintaining discipline and insuring the orderly dissemination of information.

As a matter of fact, based upon subsequent decisions of this Court, the Seventh Circuit has substantially retreated from its ruling in *Muller*. In the case of *Herzbrun* v. *Milwaukee County*, 504 F. 2d 1189 (7th Cir. 1974), the Court held valid against a challenge of vagueness and overbreadth a rule permitting discharge "necessary or desirable for the economical or efficient conduct of the business of the county or for the best interest of the

county government." After referring to the *Muller* case, the Court noted:

> "Several decisions by the Supreme Court, reached since the decision by the district court herein, and indeed since submission of this appeal, require careful scrutiny with respect to an overbreadth challenge here."

The Court then went on to cite *Arnett* v. *Kennedy,* 416 U. S. 134, 40 L. Ed. 2d 15 (1974); *Parker* v. *Levy,* 417 U. S. 733, 41 L. Ed. 2d 439 (1974); *Secretary of the Navy* v. *Avrech,* 418 U. S. 676, 41 L. Ed. 2d 1033 (1974). Also cited was *Broadrick* v. *Oklahoma,* 413 U. S. 601, 37 L. Ed. 2d 830 (1973).

In the *Arnett* case, this Court sustained the removal of a government employee "for such cause as will promote the efficiency of the service." The *Parker* case sustained an attack on a provision in the Uniform Code of Military Justice which provided for punishment for "conduct unbecoming an officer and a gentleman" and proscribed "all disorders and neglect to the prejudice of good order and discipline in the armed forces." The Court did not hesitate to apply the First Amendment to these provisions, but held that they were not overbroad.

See also, *United States Civil Service Commission* v. *National Association of Letter Carriers,* 413 U. S. 548, 37 L. Ed. 2d 796 (1973).

The test that this Court applied in *Levy* was whether the language gave fair warning as to the kind of conduct which was prohibited. This is the same test applied by the Illinois Supreme Court where, as the Court said in *City of Chicago* v. *Lawrence,* 42 Ill. 2d 461, 464 (1969):

> "An ordinance may describe conduct by their use where the meaning is clear enough to people contemplating such behavior, the test being whether they convey sufficient definite warning as to proscribed conduct when measured by common understanding and practices."

See also, *City of Decatur* v. *Kushmer,* 43 Ill. 2d 334, 336 (1969); and *City of Chicago* v. *Fort,* 46 Ill. 2d 12, 16 (1970).

Also cited but not argued by the petitioner is the case of *Flynn* v. *Giarrusso,* 321 F. Supp. 1295 (E. D. La. 1971), a trial court decision where a police lieutenant had been suspended for writing an article critical of the administration. In that case the Court recognized that the State had an interest in promoting the efficiency of the public service by which it could impose conditions on the First Amendment rights of its employees. The rule in question provided that a member of the force shall not unjustly criticize, ridicule or express hatred toward any person and shall conduct himself in accordance with the highest degree of morality. Even if the Court was right in the *Flynn* case, the rule there was obviously so broad and vague on its face as to render its precedential value absolutely nill in the case at bar.

The petitioner also cites the recent decision in *Kelley* v. *Johnson,* 47 L. Ed. 2d 708, where this Court sustained, against a Fourteenth Amendment challenge, the right of a police department to establish hair grooming standards. We suggest that the Police Department certainly has at least as great an interest in the prevention of insubordination and unjust criticism which can bring the Department into disrepute and lower morale as it does in enforcing hair grooming regulations.

To suggest as the petitioner does that derogatory and critical statements should be considered only when made publicly is of course to ignore the fact that internal dissemination has the greatest long range effect upon the efficiency of the Police Department. The fact that the acts of the petitioner did not impair the efficiency and discipline of the Police Department is more a tribute to the caliber of the Police Department than a justification for the disloyal and insubordinate behavior of former Officer Kwiek.

It is a strange twist of logic that would hold, as the petitioner suggests, that the giving of a statement about a pending criminal matter by a police officer who was present when the defendant was apprehended, was not germane to the "affairs, business or

operation of the Police Department." Whether or not a statement might be discoverable under the rules of court has nothing to do with the unauthorized dissemination of information vital to the prosecution of a criminal defendant.

The fact of the matter is that former Officer Kwiek, the petitioner in this case, not only violated the Rules which are now inaccurately attacked as being unconstitutional, but he also violated Rules not even mentioned in his petition. Any of these violations would be sufficient to justify his discharge. The totality of the offenses, which was reviewed not only by the administrative agency but by the trial court and the Appellate and Supreme Courts of this State, made his discharge imperative in the public interest.

The best answer to the allegation that this Court must pass upon the issues here in order to fulfill obligations under the Constitution of the United States is contained in the language of this Court in *Bishop* v. *Wood* at 44 LW 4822, where this Court says: "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."

We respectfully suggest that the petitioner has been accorded every aspect of due process. The hearing procedure below and the judicial review which followed were complete and in all respects fair. The petitioner was granted every conceivable opportunity by the State courts to justify conduct which made his removal necessary. He was unable to do so. We suggest that his failure lies not in any deficiencies of the State judicial system, but rather in his own deficiencies as a police officer.

CONCLUSION.

For the reasons stated above, the respondents respectfully request that the writ of certiorari to review the judgment and opinion of the Illinois Appellate Court, First District, be denied.

Respectfully submitted,

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